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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 77

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR,
PETITIONER,

v.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

RESPONDENTS' BRIEF.

WEBSTER BALLINGER,
Attorney for Respondents.

INDEX.

Subject Index.

	Page
Action of the courts below	1
Statute involved	2
Intent and purpose of statute as declared by committee of Congress	5
Agreements entered into under said statute	5
The question for decision	5
Statement of fact	6
Argument	17–35
I	17–26
II	26–30
III	31–33
IV	33–35
Conclusion	35

Cases Cited.

Ballinger v. Frost, 216 U. S., 240	24
Brown v. United States, 133 U. S., 568	28, 30
Edwards' Lessee v. Darby, 12 Wheat., 206	28, 30
Jones v. Meehan, 175 U. S., 1	32
Lane v. Hoglund, 244 U S., 174	35
Morrison v. Work, 266 U. S., 481, aff'd 290 Fed., 306	23
Oakes v. United States, 172 Fed., 305	11, 29
Rodgers v. United States, 185 U. S., 84	32
Ruggles v. Ill., 108 U. S., 526	30
United States v. Atkins, 266 U. S., 220	24
United States v. Healey, 160 U. S., 136	28, 30
United States v. Hill, 120 U. S., 169	28, 30
United States v. Moser, 266 U. S., 236	25
United States v. Graham, 110 U. S., 219	30
United States v. Temple, 105 U. S., 97	30
Work v. Mosier, 261 U. S., 353	35
U. S. ex rel. Besaw v. Work, 6 F. (2d), 694	34
U. S. ex rel. Kadrie v. Wilbur, 30 F. (2), 989	2, 22
Work v. U. S. ex rel. Goin, 18 F. (2d), 820	34
3 Comptroller of Treasury Decisions, 158	7, 27
36 Cyc., 1142	20

STATUTES AND AGREEMENTS CITED.

	Page
Agreements approved March 4, 1890, H. R. Ex. Doc. 247, 51st Cong., 1st Ses	2, 5
Act of March 3, 1849, Ch. 108, 9 Stat. at L., 395	2
Act of January 14, 1889, 25 Stat. at L., 642	2, 5
Sections 1 and 2	2, 3
Section 3	3
Sections 5 and 6	3
Section 7	3, 4
Act of June 7, 1897, 30 Stat. at L., 90	10
Act of February 6, 1901, 31 Stat. at L., 960	22
Act of June 21, 1906, 34 Stat. at L., 353	6
Act of May 18, 1916, 39 Stat. at L., 135	5
Act of April 14, 1924, 43 Stat. at L., 95	8, 13, 14, 18, 20
Act of March 15, 1928, 45 Stat. at L., 314	8, 16

REPORTS OF COMMITTEE.

H. R. Report No. 789, 50th Cong., 1st Ses	5

H. R. EX. DOC.

H. R. Ex. Doc. No. 247, 51st Cong., 1st Ses	2, 28

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RESPONDENTS' BRIEF.

Action of Courts Below.

The case is here on certiorari (R. 60) to the Court of Appeals of the District of Columbia to review the

judgment of that court (R. 58-9) reversing the judgment of the trial court (R. 14). Memorandum opinion of the trial judge (R. 14) and the opinion of the Court of Appeals (R. 52-8) appear in the record; the latter opinion is also reported in 30 F. (2d) 989.

Statute Involved.

Prior to January 14, 1889, there were eleven bands or tribes of Chippewa Indians occupying ten separate, widely scattered reservations in the State of Minnesota (H. R. Ex. Doc. 247, 51st Cong., 1st Session; R. 29). The act of January 14, 1889 (Sec. 1; R. 18-20) authorized the President to appoint Commissioners "to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except that White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said Commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated." The cessions required the assent in writing of two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to each reservation, except as to the Red Lake Reservation, the cession of which was to be deemed sufficient if assented to by two-thirds of the male adults of "all the Chippewa Indians in Min-

nesota." All agreements required the approval of the President before taking effect. Allotments in severalty theretofore made upon any of the reservations could not be disturbed, except with the consent of the allotee.

For the purpose of ascertaining whether the proper number of Indians assented to the agreements, and for the purpose of making the allotments and *payments* provided for in the Act, the Commissioners were directed while engaged in the work of securing the cessions, and before completing the same, to "*make an accurate census of each tribe or band.*"

Section 3 directed that when the census was taken and the cessions obtained, approved, and ratified, all of the Indians, except those on the Red Lake Reservation, those who had theretofore taken allotments, and those who desired at the time of removal to take their allotment on the reservation where they were then living, "shall * * * be removed to and take up their residence on the White Earth Reservation, and there alloted land in conformity with the Act of February 1887, out of the lands reserved for allotment purposes." The Indians belonging on the Red Lake Reservation were to receive allotments out of the lands reserved for that purpose on the Red Lake Reservation.

Sections 5 and 6 (R. 19) provided for the classification, appraisal, and sale of all of the ceded lands not alloted at not less than the minimum price therein fixed, and by Section 7 (R. 19-20) the net proceeds received therefrom were to be deposited in the Treasury of the United States "*to the credit of all the Chippewa In-*

dians in the State of Minnesota'' as a permanent fund, which should draw interest at the rate of 5 per cent per annum, payable annually for the period of fifty years. One-half of the interest annually accruing on the principal fund was to be paid annually in cash, in equal shares "to the heads of families and guardians of orphan minors for their use," one-fourth was to be paid annually "in cash, in equal shares *per capita* to all other classes," and the remaining one-fourth was, during the fifty-year period under the direction of the Secretary of the Interior, to "be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit." At the expiration of the fifty-year trust period, the permanent fund was to be divided and *"paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares."*

NOTE.—The only property right conferred by the agreements to which tribal membership was attached, was the right to an allotment of land, the allotments being confined to the then members of the bands or tribes whose names appeared on the census rolls. Subsequent to the approval of the agreements, no authorization is contained for the maintenance of any Indian reservation or any form of tribal government. The schools provided in Section 7 were to be located among the Indians "in their midst and for their benefit," no mention being made of their location upon any Indian Reservation. Rights to share in the money payments under Section 7 were limited to the Indians whose names appeared on the census rolls and their issue.

Intent and Purpose of Act as Declared by Committee of Congress.

The report of the House Committee on Indian Affairs on the bill that became the said Act of January 14, 1889, contained the following statement of the intent and purpose of said legislation:

> "The bill is in the nature of a proposal to the Indians, and if not accepted by them in inoperative, and nugatory. If accepted and assented to by at least two-thirds of the male adults of each band, the bill, as passed, becomes effective. *In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full citizens,* * * *" (R. 20).

Agreements Entered Into under said Act.

Agreements were entered into with all of the tribes or bands embodying the plan set out in said Act of January 14, 1889, and on March 4, 1890, approved by the President of the United States, and as expressly declared in said Act, thereupon "took effect" (R. 20).

The Question for Decision.

Petitioner contends that under Section 7 of the Act of January 14, 1889 (R. 19-20), as embodied in the agreements (R. 20), the trust fund should be regarded as a *tribal* fund; that a right to participate in the distribution of the interest annually accruing thereon is limited to *tribal* members, and that only children born during the fifty-year trust period possessing the status of tribal members can lawfully participate in the

annual division of said interest and in payments from the principal fund.

Respondents contend that the fund is held under a specific trust created by said section of said Act and agreements for the exclusive benefit of a designated class as individuals, to which no condition of tribal membership attached, and that proof that a child born during the fifty-year period is the lineal issue of a former member of the bands or tribes alone entitles the child to enrollment and to equal *per capita* shares in all payments of interest annually accruing on the fund and in the distribution of the fund itself.

Statement of Fact.

Petitioner's "Statement of Fact" (Brf. 5-9) is silent as to many pertinent facts which respondents deem material to a proper understanding of the errors assigned and relied upon. Hence a more complete statement becomes necessary.

Following the approval of said agreements, all of the unallotted members of the various tribes or bands, exclusive of the Red Lake Band, were either removed to the reserved portion of the former White Earth Reservation, where they established their residence, and were there allotted land, or were permitted to take their allotments out of the ceded lands which were part of the former reservations upon which they resided (R. 20). All of the lands reserved for allotment purposes on the White Earth Reservation were allotted (R. 21). By Act of June 21, 1906, all restrictions as to sale, encumbrances or taxation on all lands

allotted on the White Earth Reservation, and then or thereafter held by adult mixed bloods, were removed (R. 21). Since March 4, 1890, there have been *no band or tribal governments, chiefs, or councils, and no Indian reservation in Minnesota,* except the Red Lake Reservation, which was created under the Act of February 20, 1904, and with which we are not here concerned (R. 30-31).

The United States assumed the duty and obligation of making all payments under Section 7, and that duty devolved upon petitioner and his predecessors in office (9 Stat., 395, now T. 5, Sec. 485, U. S. C. A.).

Immediately following the approval of the agreements, the practice was adopted of making all payments under Section 7 *per capita* (R. 27), which practice was approved by the Comptroller of the Treasury October 21, 1896 (3 Compt. Dec., 158), said practice and ruling being more fully hereinafter explained under "Argument I".

The "census rolls" formed the evidentiary basis for all money payments under Section 7 to those persons in being when said rolls were made. The interest payments to be made annually were for the benefit of the children born during the fifty-year period as well as those in existence when the "census rolls" were made.

Accordingly, as a basis for the first payment made under Section 7, the agent of the United States in charge of the payment took the original census rolls and revised them by striking therefrom the names of all persons appearing thereon who had died since rolls were made and adding thereto the names of all chil-

dren born since the census rolls were made to parents who were enrolled on said census rolls. In adding the names of new-born children the only proof required was that the children were the children of parents whose name appeared on said census rolls, no proof of tribal or band membership, residence, affiliation with, or recognition by, a tribe or band being required. Thereafter and preceding each succeeding payment of either interest money, or from the principal, the rolls were similarly revised. This practice continued, with a slight interruption, from March 4, 1890, to January 8, 1927 (R. 27-32). The original census rolls, as thus annually revised only to the extent stated, became permanent rolls of the Chippewa Indians of Minnesota, upon the basis of which all money payments under Section 7 have been made *per capita*. Enrollment on said rolls was a condition precedent to participation in all money payments made under Section 7 (R. 26, 27-32, 36). These rolls were expressly recognized in the Act of April 14, 1924 (43 Stat., 95), as the basis for money payments under Section 7 (R. 25). No authorization by Congress for the payment of the annual interest was necessary. By Act of May 18, 1916 (39 Stat., 123, at 135), Congress inaugurated a policy in aid of the Indians of making partial distributions of the principal fund before the expiration of the fifty-year trust period. Under that act one-fourth of the principal fund was distributed *per capita*. Thereafter Congress has from time to time directed the distribution of a part of the principal fund, the last authorization being contained in the Act of March 15, 1928 (45

Stat., 314), which directed payment of $25.00 "to each of the enrolled Chippewa Indians of Minnesota."

Mary Blair, grandmother of respondents, a mixed-blood Chippewa Indian, and a recognized and enrolled member of the White Earth Band, established her residence upon, and was allotted land out of the lands reserved for allotment purposes on the White Earth Reservation (R. 20-1).

In the year 1892 there was born to Mary Blair at Richmond, Minnesota, in lawful wedlock, a child, Sarah Cogger, now Sarah Kadrie. Following her birth, she was enrolled, and her name has ever since remained on said rolls and she has at all times subsequent thereto received a *per capita* share of all money payments thereafter made (R. 21).

In 1909, Sarah Cogger married Mall Kadrie, a naturalized citizen of the United States, as a result of which union there were born to Sarah Kadrie, in lawful wedlock, the following children, on the following dates and at the following places (R. 21):

Name.	Date.	Place of birth.
Mary I. Kadrie	1/10/10	Canada.
Evelina "	5/11/11	"
Amit K. "	3/30/14	"
Bertha "	3/31/16	"
Mailivan E. "	3/31/18	International Falls, Minn.
Marie "	9/ 9/20	" " "
Dorothy "	8/29/22	" " "
Elmer "	1/ 5/25	" " "
Omar "	2/ 9/27	St. Paul, Minn.

Following the births of the three first-born children, their names were inscribed upon the money-payment

rolls by the officers and agents of the United States (R. 21), in conformity with the established practice (R. 27-31).

Following the birth of Bertha, the fourth child of Sarah Kadrie, application was made for her enrollment at the White Earth Agency. The application was transmitted to the Commissioner of Indian Affairs July 11, 1916 (R. 21-22). July 20, 1916, the application was returned to the Superintendent for investigation (R. 22). July 28, 1928, the Superintendent reported that Bertha was a child of Sarah Kadrie, who was of three-eighths Indian blood; that the mother, Sarah Kadrie, married a white man, and "left the reservation several years ago"; that the child was born in Winnipeg, Manitoba, Canada, "among the white people," of a white father, and that the parents had not lived among, or affiliated with, the Indians of said reservation since its birth. The Superintendent recommended the disallowance of the application under paragraph 324 of the regulations issued under the Act of June 7, 1897, (30 Stat 90, R. 22). August 2, 1916, the Indian Office approved the recommendations of the Superintendent (R. 22-3).

At about the same time the above action was taken in the case of Bertha, and in the year 1916, the Superintendent located at White Earth, and in charge of the money-payment rolls, recommended to the Indian Bureau that the names of a number of children and grandchildren of originally enrolled and allotted parents and grandparents whose names had been inscribed on the money-payment rolls be stricken therefrom on

the stated ground that under said regulations issued under said Act of June 7, 1897, and the opinion of the Circuit Court of Appeals in the case entitled Oakes *v.* United States (172 Fed. 305), they were not entitled to have their names on said rolls and to receive distributive shares of the money payments from the trust estate as they had not been born to membership in the tribe, had not affiliated with, and had not been recognized by the tribe as members thereof. The Indian Bureau concurred in the recommendations of the Superintendent and directed that the names of said children be stricken from the money-payment rolls, which orders were carried into effect (R. 24).

Sarah Kadrie, mother, natural guardian, and next friend of Mary I., Evelina, and Amit K. Kadrie, petitioned the Secretary of the Interior for a revocation of the order of the Indian Bureau under which the names of her minor children had been stricken from said money-payment rolls (R. 24). Similar petitions were filed by the Indian parents or ancestors of the other children whose names had been stricken from said rolls by like orders of the Indian Bureau. The question presented for decision by each of the separate petitions being identical or substantially identical, the petition filed by Sarah Kadrie on behalf of her minor children was selected as a test case and was referred to the then Solicitor for the Department for an opinion determinative of the rights of all (R. 24). On February 17, 1919, the Solicitor rendered an opinion (R. 24, 33-7) reversing the action taken by the Indian Bureau in all the cases and directing the restoration

to the rolls of the names of respondents and all other Indian children of like status. As to the rights of respondents, the Solicitor (R. 33-7) held:

> "In the particular case giving rise to a call for this opinion, Sarah Kadrie, née Cogger, was a full-blood Chippewa Indian woman born on the reservation in the year 1892—subsequent to the cession and the original enrollment. She was an only child of her mother, a member of the original enrollment. As such, she is entitled to participate for herself in the annuities; and that right is accorded to her. She married, in 1909, Mall Kadrie, a native of Syria, and since then has resided with him mainly in Canada, but for a short time in Syria—and at no time on the reservation, although occasionally visiting it. There have been born of said marriage four children, the oldest now about nine years of age. Her three oldest children were for some years enrolled among the Chippewa Indians, and she was paid annuities for them, until the year 1917, when, by direction of the Indian Bureau, their names were stricken from the roll and their annuities withheld. At the same time, the enrollment of the youngest child was refused.
>
> "In my opinion, this action was erroneous, and should be corrected. Sarah Kadrie and her children are 'issue' of her mother, a full-blood Chippewa Indian duly enrolled, and as such they will be entitled, at the expiration of the trust period, to share in the distribution of the trust fund; and meanwhile they are equally entitled to share in the annuities arising from that fund. Those rights they have not forfeited

> either by acquiring foreign citizenship or by abandoning, or failing to acquire, residence on the Indian reservation or with the tribe."

Thereupon the names of Mary I., Evelina, and Amit K. Kadrie were restored to said rolls, and the names of the other six children of Sarah Kadrie were placed upon said rolls following their births, and all of them received their distributive shares of all money payments made prior to October 1, 1927 (R. 25).

The opinion of the Solicitor rendered February 17, 1919, was adhered to in all cases of enrollment of newborn children down to January 8, 1927.

Between 1916 and 1919, during which period the names of many Indian children were stricken from the rolls by orders of the Indian Bureau, reversed by the Solicitor's opinion of February 17, 1919, and thereafter reinstated, payments had been made to the Chippewa Indians in which said children, as well as other children born during said period and of like status, did not participate solely because their names had been stricken or omitted from the money-payment rolls. To enable the Secretary to pay said children the shares to which they were entitled under said opinion of February 17, 1919, Congress enacted the Act approved April 14, 1924 (43 Stat. at L., 95; R. 25). By this Act, the Secretary was "authorized to pay, out of any moneys belonging to the Chippewa Indians of Minnesota, such amounts as he may find due any persons of Chippewa blood *whose names may have been erroneously omitted or stricken from the Chip-*

pewa annuity rolls, or who may have been or may hereafter be *found entitled to enrollment for annuity payments authorized by Section 7 of the Act of Congress approved January* 14, 1889" (R. 25). Under the authority contained in said Act, all Indian children lineal issue of enrolled ancestors who were either refused enrollment, or whose names were stricken from said money-payment rolls, during the period from 1916 to February 17, 1919, were paid the shares in all money payments made during said period to which they were entitled under the Solicitor's opinion of February 17, 1919.

January 8, 1927, the solicitor for the Department of the Interior rendered an opinion in the case of Jane B. Andrews, applicant for enrollment on the money-payment rolls of the Chippewa Indians of Minnesota (R. 26, 37-51), in which he overruled the practice that had at all times theretofore obtained since March 4, 1890, his predecessor's opinion of February 17, 1919 (R. 51), confirmed by Act of April 14, 1924 (R. 25), adopted the ruling which the Indian Bureau attempted to establish in 1916, and held, in substance, that a right to share in the money payments under Section 7 of the Act of 1889 and the agreements entered into thereunder, was dependent upon "*tribal membership, tribal affiliation, recognition and residence on an Indian Reservation*" (R. 48, 50).

Following said opinion of January 8, 1927 (R. 26), citation was issued upon Sarah Kadrie, next friend, mother, and natural guardian of respondents, requiring her to show cause why the names of respondents,

her children, should not be stricken from the money-payment rolls. Thereafter, and in due course, Sarah Kadrie made answer to said citation, setting out the descent of respondents from an enrolled parent, their Indian blood, previous enrollment, and alleging that as their rights had theretofore been put in issue upon the same basic facts upon which the citation issued and determined in the opinion of February 17, 1919, which opinion had long since become final, they could not further be inquired into by the Secretary (R. 26). On October 1, 1927, the then Secretary of the Interior signed an order (R. 26, 27), in part as follows:

> "From a consideration of all the facts in this case, which are not being recited, but are contained in the record, it is clear that these children were never entitled to enrollment and should never have been enrolled with the Chippewa Indians of Minnesota following the rule laid down by the United States Circuit Court of Appeals in the case of Julia B. Oakes *et al. v.* United States (172 Fed. Rep. 305), and the practice of the Department prior to the McGaffie opinion of February 17, 1919. Therefore the names of Mary I., Evelina, Amit K., Bertha, Mailivan E., Marie, Dorothy, Elmer and Omar Kadrie are hereby stricken from the rolls of the Chippewa Indians of Minnesota. You will make proper notation on the record of your office."

The annual interest payment for 1927 had accrued on June 30 of that year and was to be made the following December. Others would follow annually thereafter. Following the policy adopted by Congress, fur-

ther authorizations for *per capita* payments from the principal fund to the enrolled Chippewa Indians of Minnesota were to follow. In view of the conflicting opinions of the two Solicitors, dated, respectively, February 17, 1919 (R. 33-37), and January 8, 1927 (R. 37-51), the Secretary's order of October 1, 1927 (R. 26-7), was intended to provide a basis for a test case in order that the rights of respondents, and all others similarly situated, in all future money payments might be finally determined. Accordingly, November 21, 1927, formal notice was given all the Chippewa Indians of Minnesota by the Department that "all further distributive shares of the money payments to any person enrolled under the opinion of February 17, 1919, will be withheld and suspended pending further departmental action" (R. 27). The departmental action referred to will follow the final determination of this case.

The intent, object, purpose, and effect of said order of October 1, 1927, striking the names of respondents "from the rolls of the Chippewa Indians of Minnesota" (R. 27), was to deny respondents all right to participation in any and all future distributions of the interest annually accruing on the principal fund, and in all future distributions from the *corpus* of the fund, and such rights have in fact been denied respondents in all interest payments, and in the payment from the principal fund under the Act of March 15, 1928 (45 Stat. 314), made since their names were stricken from said rolls. Respondents thereupon, and on October 17, 1927, petitioned the trial court for a writ

of mandamus requiring petitioner's predecessor "to restore or cause to be restored" the names of respondents on said rolls "and to pay them their *per capita* shares in all future money payments that may be made under the authority contained in Section 7 of said agreements approved March 4, 1890" (R. 8). Petitioner answered (R. 9-13), and the case was heard in open court. March 29, 1928, the trial judge filed a memorandum opinion (R. 14) denying the writ. April 12, 1928, judgment was entered for petitioner (R. 14), from which respondents prosecuted an appeal to the Court of Appeals, where the judgment of the trial court was reversed and the cause remanded to the trial court "for further proceedings not inconsistent with the opinion of this court" (R. 59). The case is here on certiorari to review the judgment of the court below, eight grounds of error being assigned (Pet. for Writ, pp. 10-11), three of which have been abandoned (Pet., Brf. 10-11).

ARGUMENT.

The five grounds of error now urged have been further reduced to four basic grounds (Brf. 13-28). These four basic grounds will now be considered in their numerical order, the captions being omitted.

I.

The first proposition advanced (Brf. 14-19) is that the trust fund held under Section 7 of the Act of January 14, 1889, as embodied in the agreements, and the

interest annually accruing thereon, *should be regarded as tribal property*, and that only *tribal members* are entitled to participate in the annual distribution of the income from the fund. It is not claimed by petitioner that the fund is *in fact tribal property*. Thus there is presented in slightly different form the identical question which gave rise to this suit and originated in an opinion by the then Solicitor for the Department, filed January 8, 1927 (R. 26, 37-51), reversing a construction and practice that had theretofore obtained from March 4, 1890 (R. 27-32), affirmed by opinion of a prior Solicitor February 17, 1919 (R. 24, 33-7), and recognized and confirmed by Act of Congress of April 24, 1924 (R. 25).

The two opinions of the Solicitors construing the character of the fund and rights therein under Section 7 are directly in conflict. The construction contained in the Solicitor's opinion of January 8, 1927 (R. 37-51), forms the basis for the construction here insisted upon by petitioner. The construction contained in the Solicitor's opinion of February 17, 1919 (R. 33-7), is accepted and relied upon by respondents as the correct construction.

The Solicitor's opinion of February 17, 1919, was rendered in a proceeding in which the rights of the three oldest respondents to have their names restored to the rolls (their names having been shortly theretofore stricken therefrom by order of the Indian Bureau), and to receive shares in all money distributions under Section 7, and also the right of the fourth oldest respondent to have her name inscribed on said rolls, and

to participate in all money distributions under Section 7, were directly in issue. The case was made a test case, there being also in issue the rights of other Indian children similarly situated (R. 24-5). The Solicitor held that "the trust for allotments is distinct from that touching the funds, proceeds of the unallotted and unreserved lands thrown open to sale. The trust touching the fund has as its beneficiaries, not the Indian *as a tribe* (the settlers), but the *Indians as individuals* (R. 33)." He further held (R. 34) that nowhere in the trust, so far as it relates to the money payments, "is either residence with or continued or 'recognized' membership of the tribe, or birth on the reservation, or United States citizenship, or any other qualification mentioned, save only being a 'Chippewa Indian,' *i. e.*, possession in whole or in part of the blood of one of the originally enrolled members of that tribe." As to the rights of the three oldest respondents, he held (R. 36-7) that as they were the children and grandchildren of an enrolled mother and grandmother, they were entitled as of right to have their names restored to the rolls and to receive the annuities that had been withheld. As to the fourth oldest respondent, he held that she, being the child of an enrolled parent and the grandchild of an enrolled grandparent, was entitled as of right to enrollment and to a distributive share in the annuities arising under Section 7. The above construction was adopted and affirmed by the court below (R. 52-8). The Solicitor thus affirmed the practice that had obtained theretofore from March 4, 1890 (R. 27-32).

Following said opinion, the names of the three first born respondents and the names of all other Indian children similarly situated theretofore stricken from said rolls were restored, and the name of the fourth-born respondent, as well as the names of all other children similarly situated and born subsequent to the order of the Indian Bureau of August 2, 1916, were enrolled (R. 24). The Act of April 14, 1924, recognized and confirmed the Solicitor's construction of Section 7 in the opinion of February 17, 1919 (36 Cyc. 1142, Legislative Construction), and under that Act all Indian children, including respondents, who were either refused enrollment or whose names were stricken from said money-payment rolls during the period from 1916 to February 17, 1919, under the action of the Indian Bureau, were paid *per capita* shares in all money-payments theretofore made during said period.

By decision dated November 6, 1924 (unreported and not referred to in the record), in the case entitled "Application of Ralph L. Connors for back annuity payments," the then Solicitor affirmed his predecessor's opinion of February 17, 1919, in these words:

> "It is well settled by both court and departmental decisions that the right to participate in the distribution of tribal funds arising under section 7 of the act of January 14, 1889, rests upon a different basis than does the right to an allotment out of tribal lands. The latter right is dependent upon tribal membership once existing (Oakes *et al. v.* United States, 172 Fed., 305) and perchance residence on the reservation (Minnie H. Sparks, 36 L. D., 234) while the

former right is *not* dependent upon enrollment or recognition by the tribe as a member."

The Solicitor's opinion of January 28, 1927 (R. 37-52), was rendered in the case "of Jane B. Andrews, applicant for enrollment on said rolls" (R. 26). The Solicitor held the trust fund under Section 7 to be a *tribal fund* in which only *tribal members* could participate (R. 48). Tribal membership flowed from birth to an enrolled parent, recognition by the band or tribe, tribal or band affiliation, and residence on a reservation (R. 50). The prior Solicitor's opinion of February 17, 1919, was expressly overruled "in so far as it conflicts with prior rules, practice, and decisions." The only decisions or practice prior to the Solicitor's opinion of February 17, 1919, in conflict therewith were the ruling of the Indian Bureau in 1916 (R. 22-3), the decision in the Oakes case (172 Fed. 305) as misconstrued in the opinion of January 8, 1927, and the practice following the Indian Bureau's order of August 2, 1916, and continuing to February 17, 1919. All decisions, rules, and practice prior to 1916 were in exact conformity with the Solicitor's opinion of February 17, 1919.

The error committed by the Solicitor in the opinion of January 8, 1927, was in misconstruing the opinion of the court in the Oakes case (172 Fed. 305) as holding that both the right to share in the distribution of the net proceeds received from the sale of the ceded lands (which is governed exclusively by Section 7) and the right to an allotment of land (which is governed exclusively by Sections 1 and 3 of the Act of 1889) are dependent upon membership in the tribe.

Counsel ignore the fact that the act of February 6, 1901 (31 Stat. 960), under which the Oakes case was brought, conferred jurisdiction upon the court to determine only a right to an allotment of land. It conferred no authority upon the court to determine a right to share in the money payments under Section 7.

This error contained in the Solicitor's opinion of January 8, 1927, is made plain in the opinion of the Court of Appeals (R. 52-8), wherein the court (R., at 55-6), says:

> "The opinion is based chiefly upon the decision in the case of Oakes *et al. vs.* United States, 172 Fed. 305. In that case the right to claim allotment under the act of 1889 was involved. * * *
>
> "We think the decision in the Oakes case is not controlling here. In that case the court was considering the rights to allotments under the act of 1889. Of course, the only Indians entitled to allotments were Chippewa Indians then living in the State of Minnesota. The after-born issue of these Indians would have no standing in securing allotments under the act. But Section 7 of the act, relating to the placing of the funds in the Treasury and the distribution of the interest arising from the funds and of the fund itself at the termination of 50 years, treats of a different matter. It looked to and contemplated conditions that might arise in the meantime, not to conditions present at the time the act was passed and, for that reason, provision was made for the distribution of this fund 'to the Chippewa Indians and their issue, then living, in cash, in equal shares.' "

Since March 4, 1890, there have been no band or tribal reservations, no band or tribal governments, chiefs, or councils (R. 31-2), thus rendering it impossible for any child born since March 4, 1890, to have acquired tribal or band membership by birth on a reservation, recognition by any official or officials of a tribe or band, or affiliation with the members of any band or tribe.

The Solicitor's opinion of January 8, 1927, if adhered to, excludes from participation in all money payments under Section 7 all children born since March 4, 1890, to enrolled parents and would confine such payments exclusively to the original enrollees, but few of whom will be alive at the expiration of the fifty-year period.

Counsel for petitioner now concedes that respondents, and all other issue of persons whose names appear on the original census rolls, will be entitled to participate in the final distribution of the principal fund, but deny their right to share in the distribution of the interest annually accruing on the fund (Brf. 13), which latter they contend should be regarded as tribal property. In support of this latter contention, reference is made to the case of Morrison *v.* Fall, 290 Fed. 306, and, on appeal, Morrison *v.* Work, 266 U. S. 481 (Brf. 14-15). In that case there was no question presented, considered, or determined relating to the distribution among the Indians of the interest annually accruing on the principal fund, nor was any question considered or determined that throws any light upon the question now before the court, as will appear from an examination of the decisions.

Following the Solicitor's opinion of January 8, 1927, citation issued upon the mother of respondents to show cause why their names should not be stricken from the rolls. Respondents answered setting out their descent from an enrolled parent, their Indian blood, previous enrollment, that their rights had theretofore been put in issue upon the same basic facts upon which the citation issued and determined in the opinion of February 17, 1919, which opinion had long since become final, and pleading said prior determination as a bar to further inquiry by the Secretary (R. 26). The Secretary ignored the plea and by order of October 1, 1927, struck respondents' names from said rolls (R. 27). This action was clearly erroneous and beyond the power of the then Secretary. The determination of the rights of respondents by the opinion of February 17, 1919, precluded further inquiry by the Department except for fraud. If it were otherwise there could be no permanency to the rolls. If each succeeding Solicitor could change and modify the decision of his predecessor upon the same facts and law, a condition bordering upon chaos would at all times exist. Rights secured under Section 7, *supra*, are not subject to the whims and fancies of succeeding Solicitors. The case of United States *v.* Atkins (260 U. S. 220) is in point. The court in that case held that the enrollment of a member of an Indian tribe by the Dawes Commission, when duly approved, amounts to a judgment in an adversary proceeding determining the existence of the individual and his right to membership, and that it could not be annulled except for fraud alleged and proven.

In United States *v.* Moser, 266 U. S. at 242, the court says:

> "The contention of the government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. *But a fact, question, or right distinctly adjudged in the original action cannot be disputed in a subsequent action,* even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged, but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based." (Citing numerous cases.) *"A determination in respect of the status of an individual, upon which his right to recover depends, is as conclusive as a decision upon any other matter.* (Citations.)"

It will be observed that the Secretary's order of October 1, 1927, was based upon the construction of the Oakes case in the Solicitor's opinion of January 8, 1927, which has hereinbefore been shown to have been erroneous, and further upon the practice of the Department prior to the opinion of February 17, 1919, which the record shows (R. 27-32), except for the period from 1916 to 1919, to have been in exact conformity with the opinion of February 17, 1919.

II.

The second contention advanced by counsel for petitioner (Brf. 18-21) is that respondents do not come within either of the groups or classes designated in Section 7 to which the annual interest payments are to be made during the fifty-year trust period. Section 7 (R. 20) directed the payment of one-half of the interest money annually accruing in equal shares "to the heads of families and guardians of orphan minors," and one-fourth "in equal shares *per capita* to all other classes of said Indians." When the Act of 1889 was submitted by the Commissioners to the Indians for their approval, inquiry was made by the Indians of the Commissioners as to the meaning of the words "heads of families and guardians of orphan minors." The Indians desired to know who was to be considered the "head of a family"; whether the head of a family of one would receive the same amount as the head of a family of many; whether a guardian of one child would receive the same amount as the guardian of several children. The Commissioners were unable to answer these questions, and as it was the desire of the Indians and the evident intent of Congress to do equal justice, the Commissioners promised the Indians that the cash payments of three-fourths of the interest would be made "*per capita* in equal shares."

The administrative officers in making the first payments followed the practice the Commissioners had promised the Indians would be followed, of making

the payment "*per capita* in equal shares." Preceding the payment in 1896, the then Secretary referred the question to the Comptroller of the Treasury for an opinion. The Comptroller, in an opinion dated October 21, 1896 (3 Compt. Dec. 158), after referring to the reference and quoting the pertinent provisions of Section 7, said:

> "The question now raised particularly relates to the provision that one-half of the interest shall be annually paid in cash in equal shares to the heads of families and guardians or orphan minors for their use, and one-fourth of said interest shall be annually paid in cash in equal shares *per capita* to all other classes.
>
> "After a careful consideration of Section 7, I am unable to satisfactorily determine from its language what the intention of Congress was. Are the wives of the heads of families a class to be included under the phrase 'all other classes of Indians?' Strictly speaking, it would so seem; and yet this might result in such manifest injustice that, in the absence of certain language, it seems proper to hold that it was not within the contemplation of Congress in directing this distribution.
>
> "In reference to this clause the commission who negotiated this treaty said:
>
> " 'The clause of the act of January 14, 1889, providing for the payment of the interest that may accrue on the permanent fund, was to us obscure, inasmuch as it says "one-half of said interest shall be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use, and one-fourth

of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares *per capita* to all other classes of Indians," etc., and as we could neither explain this to the Indians or comprehend it so as to give it such an interpretation as would do equal justice, we promised the cash payment should be made *per capita* in equal shares.' (House Ex. Doc. No. 247, p. 24, Fifty-first Congress, first session.)

"With their statement as to the obscurity of this legislation, I fully agree, and inasmuch as this practice of making equal *per capita* payments has been uniformly followed since the passage of this act, I do not feel justified in making any other construction than that given contemporaneously with the inauguration of the enforcement of the act. Unless it is clearly erroneous, a long continued, uniform construction of an act substantially contemporaneous with its enactment, is sufficient ground to regard the question as settled, under the well-established doctrine that in cases of doubt the executive practice will be treated as the true construction of the act. (Edwards's Lessee *v.* Darby, 12 Wheat., 206; Brown *v.* United States, 113 U. S., 568; United States *v.* Hill, 120 U. S., 169-182; United States *v.* Healey, 160 U. S., 136; Bowler's First Comp. Dec., 215-223; 1 Comp. Dec., 266, *id.*, 379.)"

Long prior to the Act of January 14, 1889, Congress adopted a settled policy of encouraging the individual Indians to abandon their tribal relations and to adopt the customs, habits, and manners of civilized life. This

policy is reviewed by the court below (R. 57), quoting from Mr. Justice Van Devanter's opinion in Oakes *v.* United States, 172 Fed. 305, at 308. The Act of 1889 was enacted in furtherance of that policy. The House Committee on Indian Affairs, in its report on the bill that became the Act of January 14, 1889, declared the intention of the Act in these words:

> "The bill is in the nature of a proposal to the Indians, and if not accepted by them is inoperative, and nugatory. If accepted and assented to by at least two-thirds of the male adults of each band, the bill, as passed, becomes effective. *In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full citizens,* * * *."

The Act plainly contemplating that aid and assistance were to be afforded the issue of original enrollees born during the fifty-year trust period, the intention of the Act being to "break up their tribal relations and make them full citizens," and there being no limitation contained in Section 7 of rights to share in the fund to *tribal* members, the officers of the Department charged with the duty of making the money payments recognized the right of all children born to parents whose names appeared on the original census rolls to enrollment and to participate in the annual division of the interest money (R. 27-32), which policy continued until the Solicitor's opinion of January 8, 1927. All payments of the interest money being made *per capita,* the new-born children were accorded equal participation. This uniform construction, commencing im-

mediately after the approval of the agreements and continuing for a period of nearly 37 years, became a rule of property, and unless that rule was clearly erroneous, the long-continued adherence to the rule is sufficient ground to regard the question as settled under the well-established doctrine that, in cases of doubt, the executive practice and executive interpretation of the statute will be treated as the true construction. United States *v.* Temple, 105 U. S. 97; 26 L. Ed. 967; Ruggles *v.* Ill., 108 U. S. 526; 27 L. Ed. 812; United States *v.* Graham, 110 U. S. 219; 28 L. Ed. 26; Edwards' Lessee *v.* Darby, 12 Wheat. 206; Brown *v.* United States, 113 U. S. 568; United States *v.* Hill, 120 U. S. 169-182; United States *v.* Healey, 160 U. S. 136.

It is respectfully submitted that the court below did not err in holding that rights to share in the annual distribution of the interest money were conferred upon the lineal decendants of the originally enrolled Indians. Nor did the court below err in holding that respondents were entitled to participate in the division of the principal fund, particularly in view of the fact that the fund has been and is now being distributed in advance of the fifty-year trust period under acts of Congress directing *per capita* payments "to the enrolled Chippewa Indians of Minnesota", and the money-payment rolls form the evidentiary basis under express direction of Congress for all such payments.

III.

Under the third heading (Brf. 22-6) counsel insist that respondents are not "Chippewa Indians" in a

political or racial sense, or in the sense in which these words are used in the Act of 1889, and consequently are not entitled to share in the annual income under Section 7. Chippewa Indian blood flowing from an enrolled ancestor was made the sole muniment of a right to participate in the payments under Section 7. Respondents are conceded by petitioner to be the lineal issue of an enrolled mother and grandmother (R. 21), whose rights as Chippewa Indians have never been questioned. In a proceeding before the Department in which the rights of the four oldest respondents were directly put in issue, it was held (R. 36) that respondents were Chippewa Indians. That determination was final.

The argument then presented as to the tribal character of the fund is based upon the erroneous construction of the Oakes case by the Solicitor in the decision of January 8, 1927, which has hereinbefore been fully considered and need not be here again repeated.

It is further contended by counsel that the Act of June 7, 1897, applies to the respondents, as their father was a white man. That Act was general in its character and related to all tribal Indians and tribal Indian property. It was enacted more than eight years after Congress by the Act of January 14, 1889, had submitted to all the different tribes or bands of Chippewa Indians in Minnesota the *special* plan for the dissolution of their tribal governments and for the distribution of their entire estates, and more than seven years after the plan submitted had been accepted by the

Chippewa Indians in Minnesota and approved by the President.

It is evident that even the Indian Bureau did not consider the Act of June 7, 1897, and the regulations issued thereunder, as applicable to the Chippewa Indians of Minnesota, as no attempt was made to apply the provisions of said Act to the Chippewa Indians of Minnesota until 1916, or nearly 20 years thereafter (R. 22-3). Under the agreements approved March 4, 1890, there was a complete settlement and disposition of all the property of all the different bands or tribes of Chippewa Indians upon express terms. It is very doubtful whether Congress possessed the power subsequent to the agreements to disturb rights that had attached thereunder (Jones *v.* Meehan, 175 U. S. 1), but this question need not be here considered, as it is settled law that a subsequent statute, general in its terms, does not repeal a prior special statute, unless the repeal of the prior special statute is expressly declared in the later general law, or unless the provisions of the general law are manifestly inconsistent with those of the special, neither of which conditions here exist. The uniform rule is declared in Rodgers v. United States (185 U. S. 84, at 87-8), in these words:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the

special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

IV.

Under this section (Brf. 26-8) counsel admit (27) that the census rolls made by the Commission under the Act of January 14, 1889, were made the original basis for all money payments, but they say that before the Indian Bureau can make a payment of the interest annually accruing under Section 7 it is necessary for the Secretary "to determine what persons, as a class," are "entitled to receive payments." Respondents deny the Secretary possesses such power. The basic right to share in the division of the interest money annually accruing on the principal fund is governed and controlled by Section 7, and that right is fixed and definite, and is beyond the power of the Secretary to alter or change. There is no power in the Secretary to strike the name of an original enrollee from the rolls, except upon death, or fraud practiced in procuring the enrollment. When the issue of an original enrollee are enrolled, there is no power in the Secretary to strike their names from the rolls, except upon death, or for fraud practiced in procuring their enrollment. If it were otherwise, there could be no stability to a right to share in the interest annually

accruing on the fund. The only power possessed by the Secretary to revise the rolls is, before each payment is made, to strike the names of those who have died therefrom, and to add the names thereto of all children found to be lineal issue theretofore born of originally enrolled ancestors, following the uniform practice from March 4, 1890, to January 8, 1927.

When the preceding Secretary found as a fact that respondents were the lineal issue of original enrollees, and identified them as such, his discretion was exhausted, and there remained merely the performance of the ministerial duty of enrolling them and paying them their *per capita* shares in all money payments. The succeeding Secretary possessed no power to strike their names from the rolls and thereby divest them of the right to share in future money payments. United States *ex rel.* Besaw *v.* Work, 6 Fed., 2d Ser., p. 694; Work *v.* United States *ex rel.* Gouin, 18 Fed., 2d Ser., p. 820.

The latter case decided the right of a Minnesota Chippewa Indian, born to tribal membership, and who resided on the White Earth Reservation prior to 1883, when she left the reservation, to a share in the money payments under Section 7 (R. 20), which had been denied her by the Secretary. At page 821 the court below said:

> "It appearing that plaintiff was a Chippewa Indian in Minnesota at the time of the passage of the act of 1889, and entitled to participate in the benefits of that act, the duty of the Secretary to effect payment was merely ministerial. Ballinger *v.* Frost, 216 U. S. 240, 30 S. Ct. 338,

54 L. Ed. 464; Lane *v.* Hoglund, 244 U. S. 174, 37 S. Ct. 558, 61 L. Ed. 1066; Work *v.* Mosier, 261 U. S. 353, 43 S. Ct. 389, 67 L. Ed. 693."

The Secretary's duty under Section 7, particularly in view of the long-continued practice and the express ruling of the Solicitor of February 17, 1919, was ministerial, and the mere fact that the statute invested him with some discretion does not relieve him from the performance of a duty that the statute plainly contemplated he should perform. Lane *v.* Hoglund, 244 U. S., at 182.

Conclusion.

This is a test case designed to determine the rights of Indian children to share in the money payments under Section 7 (R. 20). If birth and continued residence upon a tribal reservation, recognition by a tribal government, and association and affiliation with tribal members are essential prerequisites to a share in the money payments, as held in the Solicitor's opinion of January 8, 1927 (R. 27-51), and now insisted upon by petitioner, then no child born to an original enrolled parent since March 4, 1890, has had any right to share in the distributions that have occurred, or in future distributions, for during said period there have been no tribal reservations and no tribal governments. From March 4, 1890, to January 8, 1927, or for a period of 37 years, the annual interest payments and two-thirds of the principal fund have been disbursed among the original enrollees and their issue, in conformity with the practice that at all times obtained prior to

the Solicitor's opinion of January 8, 1927. During that period several million dollars have been disbursed to the "*issue*" of the original enrollees. If the Solicitor's opinion of January 8, 1927, reversing, as it does, the entire practice theretofore existing, is the law, then a liability would attach to the Government of the United States for the several million dollars heretofore paid to the "issue," and all distributions in the future would be confined to such of the original enrollees as are alive at the time the future payments are made. The disastrous effects of such a ruling must be apparent.

Council for respondents respectfully submit that the judgment of the court below was correct, and should be affirmed.

Respectfully submitted,

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